



APPEAL PANEL DECISION FORM

2019-1

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$0
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$1,308,516.75
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Remand to Claims Administrator		

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment *(optional)*:

CLAIMANT: [REDACTED]

CLAIM ID: [REDACTED]

Claimant is a [REDACTED] in [REDACTED] Louisiana. In 2017, the Program denied the claim and Claimant appealed. The Appeal Panel affirmed the denial. Claimant then sought Discretionary Review. While that request was pending, the Fifth Circuit issued its decision removing the ISM's from Policy 495. The Program re-analyzed the claim and again issued a Denial Notice. Claimant sought ReConsideration and eventually the Program issued an Eligibility Notice awarding Claimant the sum of \$177,814.64 (pre - 0.25 RTP). Claimant again appealed asserting it was entitled to a greater award because the Program improperly moved revenue. In August 2018, the Appeal Panel sustained the Appeal and remanded the claim back to the Program to recalculate the claim without moving revenue. On October 1, 2018 the Program issued an Eligibility Notice awarding Claimant the sum of \$1,308,516.75 (pre - 0.25 RTP). BP filed an appeal which is currently before this Appeal Panel.

BP appeals on three issues:

- 1) the "attestation" issue;
- 2) errors related to tuition revenue; and,
- 3) errors by the Program related to "Fundraising Income".

The "attestation" issue requires no action from this Panel. BP further concedes that the tuition revenue issue was previously decided by a prior Appeal Panel contrary to BP's current position. Therefore, the Appeal Panel determines that said issue has been previously adjudicated.

The issue involving "Fundraising Income" is more problematic. In fiscal years 2008 and 2009 that income is booked in June although the income is derived from events in various months of the fiscal year. In 2010, the income is booked in the months the events occur (November, January, March and June). Then, in 2011 the income is booked only in June (similar to 2008 and 2009). BP asserts this amounts to an accounting error which should have been investigated and addressed by the Settlement Program.

Claimant responds that the Program investigated the issue involving "Fundraising Income". However, the Program's response to Request for SOR the Appeal Panel received does not bear this out. In the SOR, the Settlement Program states: "the Settlement Program did not specifically consider the reallocation of fundraising revenues in fiscal year 2010 during the calculation of the claim". More troubling is that Claimant booked the income in the 2 prior years and in the subsequent year in June. So, 2010 is an outlier from the other 3 years. To compound the problem, the Program's response to the Request for SOR admits that if the revenue in 2010 is booked in June (like the other 3 years), Claimant no longer passes causation for the V-Test Revenue Pattern but would pass the Revenue Portion of the Decline-Only Test. In that case, the Program would have to determine if Claimant met the other requirements of the Decline Only Test.

Finally, Claimant asserts BP waived its rights to raise the “Fundraising Income” issue because BP did not raise the issue when Claimant appealed the original award (\$177,814.64 before RTP). Claimant cites Rule 9 of the Rules Governing the Appeals Process. That Rule states:

“Rule 9 - Consolidated Appeal Process for Each Appealable Claim After BP or the claimant initiates an Appeal as the appellant, the appellee shall raise any and all appealable issues within the same appeal when it submits its Initial Proposal and may not initiate a separate appeal for the claim (except in the case of Fraud, Waste and Abuse (“FWA”) Appeals which are to be governed by Title VI of these Rules). The original appellant shall be limited to the issues raised in its Notice of Appeal, except as necessary to respond to new issues raised by the appellee in its Initial Proposal. The appellee shall be limited to the issues raised in its Initial Proposal. The Appeal Panelist shall not consider issues raised by either the appellant or the appellee after the Notice of Appeal and/or Initial Proposal, as provided in this Rule”.

The Appeal Panel has not seen this Rule 9 issue discussed in any prior Appeal Panel decisions. The flaw in Claimant’s position is that it treats this situation as if it were all one appeal when there are, in fact, multiple appeals over the life of this claim. The Appeal Panel finds that it does not apply here because BP did not appeal the original Eligibility Notice and this Appeal deals with a subsequent, different and substantially larger award and different Eligibility Notice. BP properly reserved its rights in the instant appeal.

After de novo review, the Appeal Panel unanimously finds that this matter must be remanded to the Settlement Program to determine if the recordation of Fundraising Income in fiscal year 2010 was an “error” as set forth in Policy 495.



APPEAL PANEL DECISION FORM

2019-2

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business	First	Middle
	████████████████████ ██████████		
Claimant ID	██████████	Claim ID	██████████
Claim Type	Business Economic Loss		
Law Firm	████████████████████		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$0
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$640,177.17
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment *(optional)*:

See full written decision uploaded separately.

BP appeals the BEL award to claimant, an electrical contractor located in █████ Florida. BP asserts the Settlement Program (SP) erred in reclassifying this claim from a Failed BEL claim to the general BEL framework; in failing to reconcile discrepancies in claimant's 2010 federal tax return and its P&Ls; in misclassifying claimant's "Tools" and "Supplies" expenses as fixed expenses; and in accepting claimant's attestation assertions.(This last contention is preserved without further review.)

BP's first principal assertion is that the SP failed to investigate sufficiently whether claimant's June 2010 surrender of assets constituted a relinquishment of "substantially all" of claimant's assets; and whether it failed to determine that claimant had failed as a business entity as a result thereof warranting application of the Failed BEL framework. Secondly, BP contends the SP failed to reconcile duplication of certain expenses in claimant's P&Ls not reflected in claimant's 2010 federal tax return. Finally, BP argues "Tools" and "Supplies" are variable expenses as reflected in claimant's P&Ls.

Claimant responds that the record discloses its operations successfully reorganized and continued as an ongoing entity through 2010 and thereafter as reflected in its financial records. Claimant further argues there was no double counting of variable expenses as all expenses were properly segregated and categorized. Lastly, claimant posits "Tools" and "Supplies" were properly classified by the SP as fixed expenses since these were items used in claimant's day to day operations to maintain its business operations without regard to fluctuating customer orders or demands.

A review of the record discloses that claimant filed a Chapter 11 bankruptcy in early 2009. A prior appeal panel determined on May 22,2018, that since such filing occurred prior to May 1, 2010, this fact alone did not support application of the Failed BEL framework. It remanded the claim to the SP for further evaluation whether the June 2010 surrender of property constituted a surrender of "substantially all" of claimant's assets; and to determine if claimant successfully reorganized or ceased operations and wound down. Following remand, the SP on August 6,2018, determined that claimant had successfully reorganized and continued to operate so that the Failed BEL framework was not applicable. The SP issued an eligibility notice applying the general BEL framework. This appeal by BP ensued.

After reviewing the argument of the parties, this panel submitted an SOR request to the SP seeking an explanation for the basis of the decision not to apply the Failed BEL framework. The SP explained:

"Per the Appeal Panel decision issued on May 22, 2018, the Appeal Panel determined the Claimant's 2009 filing of bankruptcy was not grounds for designating the claim as a Failed Business as the filing occurred prior to the relevant period of May 1, 2010 through December 31, 2011. Additionally, as instructed by the Appeal Panel, the Settlement Program reviewed the supporting documentation and determined that the liquidation event on June 2010 and subsequent reduction in accounts receivables pursuant to the Chapter 11 filing constituted a surrender of "substantially all" of the Claimant's assets. However, considering the particular facts and circumstances of the claim, the Claimant appears to have successfully rehabilitated and continued to operate through 2012 as the DWH Accountant requested the 2012 1120 Federal Tax Return (DOC ID █████ which supports the Claimant did not cease operations subsequent May 1, 2010 but prior to December 31, 2011 (see Calculation Note #12). "

Upon further review of the record in light of this SOR response, this panel is satisfied the SP correctly determined the Failed BEL framework should not have applied and correctly applied the general BEL framework. Nor is there any factual support for the suggestion of BP that claimant's Chapter 11 proceeding was converted to a Chapter 7 bankruptcy for failing to meet the requirements of the reorganization plan at the time relevant to this claim. See Exhibit B of DOC ID [REDACTED] and DOC ID [REDACTED]

Relative to the remaining two issues, this panel concludes neither of these contentions of BP has merit. First, the record does not support the argument there were duplicate expense entries. The P&Ls show entries for COGS and a separate entry for other unrelated expenses as do claimant's 2010 tax return. Furthermore, these variances were addressed by the SP and reconciled accordingly. See calculation note 6, DOC ID [REDACTED] Finally, the "Tools" and "Supplies" expenses were categorized properly as fixed expenses consistent with the provisions of Exhibit 4D of the Settlement Agreement. There is no rational basis, other than surmise, to conclude these expenses were tied to the level of customer demands rather than the necessity of day to day operations. Even if one or more of these assertions were deemed meritorious, their application in this baseball appeal would not vitiate the substantial monetary award to claimant and support the zero dollar final proposal of BP.

For the reasons stated above the final proposal of claimant is selected over that of BP.



APPEAL PANEL DECISION FORM

2019-3

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Wetlands Real Property		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$2,612.96
	Risk Transfer Premium	2.50
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$22,480
	Risk Transfer Premium	2.50
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

Claimant owns 6.67% of a parcel of Wetlands Real Property located in Plaquemines Parish, Louisiana, identified as Parcel ID [REDACTED]. Claimant, along with her co-owners, filed Wetlands Real Property Claims and received an Eligibility Notice. Claimant appeals from the Eligibility Notice and contends that the length of the oiled shoreline should be greater than that determined by the Claims Administrator. Claimant also contends that the Claims Administrator erred



by failing to compensate her for non-oiled shoreline. In support of her claim, Claimant submitted a lengthy and detailed report from [REDACTED], a noted scientist with extensive experience with the spread of oil following the DWH Spill. Claimant also submitted documentation from two experts to rebut the Claims Administrator's conclusion that the length of the non-oiled shoreline could not be accurately measured. The claims raised in this appeal are identical to those asserted in Claim ID [REDACTED] another [REDACTED] Wetlands Real Property Claim. In a detailed decision in that claim, the panel agreed with the findings of the claimant's experts and accepted the claimant's final proposal. Following a de novo review of this record, this panel is lead to the same conclusion and, for the reasons expressed in the panel's decision in Claim [REDACTED] adopts Claimant's final proposal as the correct result.



APPEAL PANEL DECISION FORM

2019-4

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input checked="" type="checkbox"/> BP's Final Proposal	Compensation Amount	\$0
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$114,440.84
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

See uploaded decision.

██████████. – Claim ██████████

Claimant, a Zone D motorcycle manufacturer in Birmingham, Alabama, appeals from an Eligibility Notice awarding -\$52,575.82. In a previous appeal, Claimant submitted an affidavit from an accountant and revised P&Ls which purportedly corrected the P&Ls upon which the award was based which Claimant contended incorrectly recorded revenue in 2010 which should have been reported in 2009. Because this information was not available to the Program, the prior Appeal Panel remanded the claim with instructions to review the new information.

The Program accountants reviewed the new information and concluded:

DWH Accountant reviewed the new information provided by Claimant on appeal and determined it should not be considered for the purposes of the calculation. The revised revenues provided for 2009 and 2010 are not supported as the P&Ls used in the calculation tie to the tax returns, which are maintained on the accrual basis of accounting. DWH Accountant determined the P&Ls do not contain errors and are maintained consistently each year from 2007-2011. As such, no adjustments to revenue are needed and no changes have been made to the calculation.

See Calculation Note 15.

Claimant retained a certified public accountant who reviewed Claimant's P&Ls, tax returns, and jobs, and concluded in an affidavit submitted in support of the appeal that "several projects were incorrectly reported as revenue for 2010 when the majority of the work was actually performed in 2009." The accountant further reasoned that "this 'error' is most likely due to a change in the entity's business structure in 2009."

The panel sought clarification from the Program why it concluded that the accountant's conclusions did not constitute "errors" which should be corrected as argued by the Claimant. In response, the Program stated:

The Settlement Program Accountants reviewed the affidavit as well as the revised P&Ls and determines that no "error" existed because the revised P&L:s were not supported by underlying invoices or any form of supporting documentation in order to substantiate any "errors" in 2010. Furthermore, the contemporaneous P&Ls were audited on an annual basis . . . and deemed to be maintained consistently under the accrual basis of accounting . . . any potential "errors" due to "a change in

the entity's business structure in 2009" would have been reflected at year end, which was not the case as there were no significant year-end adjustments in the audited financials.

As such, the Settlement Program Accountants made the determination in their professional judgment that the contemporaneous P&Ls were maintained consistently and determines that there were no such "errors."

BP notes that Claimant previously explained that its revenue was recorded upon delivery of the motorcycle and that, prior to delivery, all work performed is work "in progress" until the motorcycle is complete. BP argues that Claimant recognizes revenue at the end of a project, regardless of the period of time that work on the project is performed.

The Program accountants are afforded wide latitude in the exercise of their professional judgment in determining whether errors in financial records are present and the exercise of such discretion has consistently been upheld by the District Court. After a de novo review of the record, the panel finds that the affidavit of Claimant's accountant alone, coupled with revised P&Ls, unsupported by any documentation of what revenue from what jobs were incorrectly recorded is insufficient to warrant remand of this claim. The record supports the conclusion of the Program's accountants and, accordingly, the award was properly calculated. BP's final proposal prevails.



APPEAL PANEL DECISION FORM

2019-5

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business	First	Middle
	[REDACTED]		
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Wetlands Real Property		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$3,116.95
	Risk Transfer Premium	2.50
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$18,902.30
	Risk Transfer Premium	2.50
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

Claimant appeals from an Eligibility Notice issued in its Wetlands Real Property Claim. This is one of multiple appeals relating to parcels located in [REDACTED] of Plaquemines Parish, Louisiana, specifically Parcel ID [REDACTED] of which the Claimant owns a fractional share. As in the other claims, Claimant contends that the Settlement Program erred by concluding that its parcel was non-oiled and therefore awarded only Category B compensation. Claimant argues that it should be entitled to Category A



compensation.

As in the other claims, Claimant relies upon a July 26, 2018 report from [REDACTED] that concluded that the parcel was, in fact, oiled. This panel has conducted a de novo review and noted the decisions of prior panels in claims [REDACTED] [REDACTED] [REDACTED] and [REDACTED] involving the same issue, each of which accepted [REDACTED] findings and held that the claimants were entitled to Category A compensation. This panel concludes likewise and, for the reasons expressed in claim [REDACTED] and [REDACTED] accepts Claimant's Final Proposal as the correct result.



APPEAL PANEL DECISION FORM

2019-6

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Denial Upheld

Denial Overturned

Remand to Claims Administrator

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Claim should have been excluded.**
- Claim should have been denied.**
- Claim should not have been excluded.**
- Claim should not have been denied.**
- No error.**

Comment (optional):

[REDACTED] filed this Business Economic Loss claim under the Settlement Agreement. The Settlement Program denied the claim on multiple occasions because "The Claim does not satisfy the requirements of the customer mix test." Calculation Note 10. [REDACTED] appeals.

After Claimant received a Denial Notice because it failed the Customer Mix Test, Claimant provided the Settlement Program with a new customer list. The Settlement Program then issued a Post-Reconsideration Denial Notice noting that the new information had "variances" that were significant. Claimant then sought to reconcile those variances and ultimately filed new accrual P&L's. This appeal ensued a day later.

[REDACTED] requests a remand so that the new accrual P&L's can be considered by the Settlement Program on determining whether [REDACTED] passes the Customer Mix Test. BP argues that the new information cannot be considered on appeal because it was "submitted contemporaneously with this appeal" and that Appeals Process Rule 13 "does not suggest that claimants are permitted to supplement the appeal



record.” BP Opposition Memorandum at 2, note 3.

This Panelist sent a Request for Information/Summary of Review to the Settlement Program inquiring (1) was the new information filed before the appeal or as BP indicated in its Opposition Memorandum; and (2) if the information is considered, would Claimant pass the Customer Mix Test?

The Settlement Program responded, “The Claimant submitted new accrual P&L’s on August 19, 2018, before filing an appeal on August 20, 2018.” Because August 20, 2018 was the deadline to appeal, the new P&L’s were “not available to the Settlement Program during its initial review or its review on reconsideration.” Claims Administrator’s Response.

In this instance, the Settlement Program has diligently processed all information provided to it. Claimant has also worked diligently to provide the necessary information to ascertain whether Claimant passes the Customer Mix Test. BP’s reliance on Rule 13 is misplaced. Rule 13(e) states, “The entire Claim file on the claim with the Claims Administrator” is part of the record.” Here, that file included the newly submitted P&L’s. Also Rule 13(f) is applicable.

The second question posed to the Settlement Program in the Request for Information/Summary of Review is whether Claimant passes the customer mix test if the newly submitted P&L’s are considered. The Settlement Program responded “the Claimant would pass the Customer Mix Test.” See Response at 2.

BP’s approach ignores that the new information was filed before the appeal, albeit only shortly. It also ignores the ongoing efforts made by the Claimant to supply the information needed by the Settlement Program. In remanding the appeal to the Settlement Program for further processing, BP’s note in its Opposition Memorandum at Footnote 1 is acknowledged. This opinion only addresses the customer mix information newly submitted and does not decide other issues not presented here.



APPEAL PANEL DECISION FORM

2019-7

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First [REDACTED]	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Subsistence		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$0
	Risk Transfer Premium	2.25
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$33,037.36
	Risk Transfer Premium	2.25
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

The Settlement Program awarded Claimant \$37,992 pre-RTP for his subsistence claim, which includes a 30% reduction made by the Settlement Program because the Field Visit Team determined that (1) Claimant claimed lost seafood harvested by two boats during the loss period, when he only had one boat, and (2) the 30% reduction approximated the removal of seafood harvested by the improperly claimed boat. This claim was previously denied by the Settlement Program, but a prior Appeal Panel remanded the claim for calculation of the



award, subject to the 30% reduction. BP now appeals contending the award does not comply with the Settlement Agreement for three reasons:

First, an intervening decision from the Fifth Circuit (issued December 4, 2018 and after this appeal was noticed) held, according to BP, that a claimant who does not submit an accurate statement of his losses on his claim form is not entitled to any recovery and that the Settlement Program may not approximate a claimant's award to "excise[] the impact of his misrepresentations."

Second, Claimant is not entitled to any compensation at all because the consumable weight of seafood for which he is requesting compensation, even after excluding the seafood attributable to the improperly claimed second boat, exceeds reasonable consumption rates in violation of the Settlement Agreement. BP submits that Claimant's alleged consumption rates amount to nearly two pounds of seafood per dependent, per day, every day, for each day of the 250-day loss period. This, says BP, includes small children who would not have consumed this much seafood.

Third, the Settlement Program incorrectly calculated a 250-day loss period. The closure period for Claimant's fishing locations was no more than 116 days.

It appears to this Panelist that all of these issues were either previously raised and decided by the prior Appeals Panel or should have been raised in the prior appeal. Where an issue was fully presented and ruled on by a prior panel it is simply a re-argument of the issue and is, in effect, barred by what in effect is the "law of the case." Where a party fails to raise an issue the party should have in a prior appeal the issue is waived. More problematic is BP's argument that an intervening decision from the Fifth Circuit after this appeal was noticed held that a claimant who does not submit an accurate statement of his losses on his claim form is not entitled to any recovery and that the Settlement Program may not approximate a claimant's award to "excise [] the impact of his representations." Claimant ID [] v. BP Exploration & Production, Inc., No. 18-30493 (5th Cir. Dec. 4, 2018). In that decision the Fifth Circuit affirmed the Settlement Program's decision "based on the field team's inspection—that [the claimant] had misrepresented (emphasis supplied) the amount of natural resources lost[.]" However, in that claim the facts and the Court speaks to "misrepresentations" made by the Claimant. In the present appeal the prior Appeals Panel determined, in effect, that the Claimant made innocent mistakes ("This panel finds credible Claimant's explanation that he was confused when responding to the Field Team's questions regarding his utilization of that vessel in 2009. His trip tickets clearly indicate his fishing activity from both vessels in 2007 and 2008, as contrasted to 2009 when only the [REDACTED] is recorded. Accordingly, this panel has no hesitation in concluding his claim for loss of subsistence while fishing from the [REDACTED] must be granted)." "Innocent mistakes" do not rise to the level of "misrepresentations." "Misrepresentation" is defined as "the action or offense of giving a false or misleading account of the nature of something," while a "mistake" is defined as "an action or judgment that is misguided or wrong-- accidentally; in error." Thus, the level of Claimant's error (whether it was an "innocent mistake" or a "misrepresentation") was also decided and resolved by the prior Appeals Panel. There is nothing else in the present appeal that is of any consequence. Therefore, this Appeals Panelist selects Claimant's Final Proposal.



APPEAL PANEL DECISION FORM

2019-8

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business	First	Middle
	████████████████████ ██████████		
Claimant ID	██████████	Claim ID	██████████
Claim Type	Business Economic Loss		
Law Firm	████████████████████		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input checked="" type="checkbox"/> BP's Final Proposal	Compensation Amount	\$7,240,449.94
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$33,681,566
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

Reallocation/Reclassification of Revenue

At the close of each fiscal year, Claimant records a bookkeeping transaction by which the current year's pool sells its remaining cotton inventory to next year's pool. The Program determined that this transaction represented an Intercompany Sale that should not be treated as revenue to the current year's pool per Policy 328 v.2. Additionally, the Program reclassified these amounts as COGS.

Claimant argues that this apparent reallocation of revenue from one year to another violates Policy 495, which prohibits the reallocation of revenue save for "error." Further, Claimant argues that it was error for the Program not to treat this sale as revenue per Policy 328 v.2, as these transactions were arms-length. Lastly, Claimant contests the reclassification of this revenue to expenses (specifically COGS).

A review of the records shows that the Program did not move these inventory sales (alleged revenue) from one year to another. Rather, pursuant to Policy 328 v.2, the Program determined that these transactions were not revenue to Claimant, but instead Intercompany Sales, and thus not revenue. Hence, no reallocation of revenue occurred. More importantly, even if the Program's Intercompany Sales determination were incorrect, the Program subsequently reclassified the amounts of these transactions as expenses (COGS), thus rendering the Program's initial determination moot.

(See below for a discussion as to whether or not this reclassification was appropriate.)

COGS Account

As noted earlier, Claimant is a non-profit cotton cooperative. Under its business model, Claimant's members provide cotton pursuant to written agreements that is then sold by the Claimant. Under the agreements, ownership of the cotton passes to the Claimant and the sale proceeds are remitted on a prearranged schedule, net of expenses. On the P&Ls, the distributions to the members are listed below the line, i.e., after the net operating proceeds. The reviewing accountants determined that the member distributions should be treated as Costs of Goods Sold (COGS) for the cotton marketed by the Claimant. The accountants made an adjustment at the end of each fiscal year which allocated these as variable expenses using the AVM methodology.

On appeal, Claimant argues that the Settlement Program engaged in the improper reallocation of revenue in contravention of the 5th Circuit's Policy 495 decision and the District Court's implementing order. Claimant contends that in the absence of an accounting error in the P&Ls, the Settlement Program lacked authority to reclassify the member distributions as COGS. At the outset of the appeal, Claimant contended that all of the member distributions should have been classified as revenue and initially sought a revised award of \$563,099,405. Doc ID



After additional briefing, Claimant advanced the alternative argument that the amounts treated as COGS should be reduced by the sums that were held back and not distributed to the members each fiscal year but retained on Claimant's balance sheet. In other words, Claimant urges that the withheld distributions represent the members' equity in the cooperative. Hence, Claimant submits a revised Final Proposal of \$33,681,566 representing the award it says would

result from the removal of the “tens of millions of dollars a year” from COGS. Doc ID [REDACTED]

In response, BP argues strenuously that Claimant neither earns nor pays taxes on the member distributions it seeks to categorize as revenue¹. Instead, BP emphasizes that these sums are, by definition, paid out to the members and are shown as “Current Liability” on Claimant’s balance sheet and not as “Member’s Equity.” Doc ID [REDACTED] BP finds no error in the classification of the payments as COGS and stresses that the funds actually belong to the members who supply the cotton in the first instance, regardless of when the payments to the members are actually made. Stated differently, BP argues that the member payments are costs that correspond with the revenue earned during a given year. See *Id.*, Exhibit A (Affidavit of [REDACTED]).

We turn first to whether COGS was the appropriate category for reclassification of the member payments. Exhibit 4C provides that “... *for claimants that include Cost of Goods Sold (COGS) in their financial statements, COGS will be treated as a variable expense...*” Here, Claimant’s P&Ls do not include COGS. Exhibit 4C goes on to instruct the Program on the breakout of the categories of expenses *within* COGS but does not address the situation presented here where no COGS appear in the financials. We do not read this provision in isolation. When examined in the context of Policy 495’s express deference to the professional judgment of the examining accountants, we discern nothing that would foreclose the classification of the outgoing payments as COGS even though none appear on the submitted P&Ls. This is

¹Claimant points out in response that as a non-profit cooperative, the member distributions are exempt from taxation.

especially true where, as here, the member payments most closely approximate the acquisition costs of the cotton. Under these circumstances, no abuse of the accountant's professional judgment has been shown.

A stickier issue is Claimant's alternative suggestion that the member distributions retained on its books at the end of each fiscal year should be removed from the COGS deduction and returned to the revenue column. Claimant argues that these amounts were withheld from and used to capitalize the cooperative. Claimant analogizes these retained amounts to the shareholders' equity in a private corporation. According to Claimant, these funds would be repaid to the members last in the event of Claimant's dissolution and are utilized as operating expenses under Claimant's non-profit framework.

BP criticizes Claimant's member retainage argument, pointing out that the P&Ls do not delineate whether the retained earnings came from the sale of cotton or another source such as hedging activities. BP submitted affidavits from accounting experts that, *inter alia*, emphasize that Claimant is still obligated to eventually return these funds to its members. The *en banc* panel sought input from the Settlement Program about whether it was aware of Claimant's contention that a portion of the member distributions were held back and the rationale for treating the retained earnings as COGS. The Program ultimately responded with excerpts from Claimant's balance sheets but did not directly answer the panel's questions. The parties then fired additional salvos of supplemental briefing which likewise failed to further illuminate the issue.

Although this is a closer question, we conclude on balance that the earnings retained by Claimant ultimately do not belong to it and therefore should not be regarded as revenue. Again,

the Program's treatment of these amounts as COGS was within the professional judgment of the reviewing accountants.

For the foregoing reasons, we affirm the Settlement Program's award, deny Claimant's appeal and select BP's Final Proposal as the correct result.



APPEAL PANEL DECISION FORM

2019-9

I. CLAIMANT AND CLAIM INFORMATION

Claimant Name	Last/Name of Business [REDACTED]	First	Middle
Claimant ID	[REDACTED]	Claim ID	[REDACTED]
Claim Type	Business Economic Loss		
Law Firm	[REDACTED]		

II. DECISION

Select the Compensation Amount set forth in either BP's Final Proposal or the Claimant's Final Proposal as the final outcome on the claim and check the appropriate box to signify your decision.

<input type="checkbox"/> BP's Final Proposal	Compensation Amount	\$0
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0
<input checked="" type="checkbox"/> Claimant's Final Proposal	Compensation Amount	\$62,111,010.04
	Risk Transfer Premium	.25
	Prior Payment Offset	\$0

III. PRIMARY BASIS FOR PANELIST DECISION

Please select the primary basis for your decision. You may also write a comment describing the basis for your decision.

- Error in documentation review.**
- Error in calculation.**
- Error in RTP multiplier.**
- Error in Prior Spill-Related Payment Amount.**
- No error.**

Comment (optional):

See unanimous full written decision uploaded separately.

BP appeals the BEL award in the sum of \$62,111,010.04, pre-RTP, to claimant, a wholesale distributor of agricultural chemical supplies located in ██████████ Florida. BP asserts the Settlement Program (SP) committed a multitude of errors in its evaluation of the claim as more fully described to follow. As a result of these asserted errors, BP offers zero dollars in its final proposal. Claimant responds that the SP conducted a “painstaking” review by confronting these precise issues and vetting them through numerous exchanges with claimant. Because of these documented exchanges, claimant contends the record contains ample support for the decision reached and the award delivered by the SP.

BP first argues that the SP misinterpreted certain intercompany transactions with related subsidiaries and misapplied policy 328 v.2 in excluding these transactions as part of claimant’s revenues. The record reflects claimant is a multi-divisional enterprise that operates through coordinated efforts of its related various divisions. Specifically, BP challenges the treatment of account 602300 in claimant’s P&Ls (relating to sales to third parties) as an excluded related party transaction by the SP. BP contends these transactions were not related party transactions; and even if they were, they were arm’s length transactions not subject to exclusion. Upon review of this record, this panel finds that while it shows claimant and its subsidiaries conducted transactions with unrelated third parties, it also reveals the profits and losses derived from such transactions were calculated from a predetermined formula not indicative of or consistent with arm’s length transactions. Thus, the SP was correct in its decision to exclude these transactions under policy 328 v.2 as explained in its post-reconsideration eligibility notice and calculation notes 19,20 and 22. There is no adequate basis to disturb this determination of the SP.

Next, BP argues the SP incorrectly attributed revenues received from ██████████ to November 2008 when such revenues were originally recorded in claimant’s P&Ls and attributed to July 2008. Alternatively, even if such adjustment were warranted, BP contends derivative accounting rules apply since the commodity sold had a fluctuating market price between July 2008 (when the sale of the product was negotiated with ██████████ and when it was finally sold by ██████████ in November 2008. This panel finds the SP was correct there was accounting error present as defined in policy 495; and to adjust the entry to November 2008 (as explained in calculation notes 15 and 16) to reflect when the sale was consummated and revenue was recognized. Furthermore, there is no basis to treat this transaction as the sale of a derivative product or to apply a different accounting protocol.

Separately, BP also argues that the SP incorrectly excluded revenue derived by claimant through the sale of derivatives traded on the open market. Calculation note 13 discloses the SP analyzed these transactions; and concluded that since they were not part of claimant’s ordinary business operation, any revenue derived therefrom should be considered investment income and excluded under policy 328 v.2. This revenue is a miniscule component of claimant’s annual revenue so that its consequential impact on the overall award would be negligible. This panel finds no basis to disturb this determination of the SP.

Moving on, BP argues the SP should have applied policy 495 and the AVM methodology rather than the general BEL methodology because fluctuations in claimant’s annual variable margins were indicative of a mismatch between revenue and expenses. The record discloses the SP applied policy 495 and in its analysis found none of its matching criteria was triggered. Even though no criteria were triggered the SP did consider whether there were “other significant indicia” of mismatches and concluded there were

none. See calculation notes 23 and 24. To this panel this decision was an acceptable exercise of professional judgment by the SP reviewers and should not be disturbed.

Because claimant was headquartered in [REDACTED] and maintained out-of-zone locations in Nebraska and Iowa, BP contends these locations were “facilities” as defined by policy 467 and produced revenues which were subject to exclusion and overlooked by the SP. The record indicates otherwise. First, even if the [REDACTED] location was a “facility” it was not one from which claimant managed or supervised its operations the subject of this claim. It was merely a location that administratively oversaw all of claimant’s global operations. Furthermore, the SP conducted outreach to claimant to learn where and to what extent claimant operated in Florida and elsewhere. In DOC ID [REDACTED] claimant provided explanation. Additionally, calculation note 2 in DOC ID [REDACTED] fully summarizes the efforts of the SP to identify out-of-zone operations and whether they constituted a “facility” under policy 467. Since these identified structures were temporary in nature and used to store products only, the SP concluded they were not a “facility” requiring further investigation. Nothing in claimant’s P&Ls point to these various locations generating out-of-zone revenues subject to exclusion. There is no factual basis to overturn this determination of the SP. It is also noted that some of the locations identified by BP did not come into existence until after the Spill and would not be relevant to any award calculation.

Finally, BP posits that claimant is an excluded class member because it qualifies as a business entity engaged in the “Finance and Insurance Sector” of Section 52 of the NAICS Code, thus subject to exclusion as a class member under Exhibit 18 of the Settlement Agreement. This contention is specious and without factual basis. The SP assigned claimant NAICS code 424910 (Farm Supplies Merchant Wholesaler). The record fully supports this determination of the SP.

BP also raised a weak and oblique argument relative to claimant’s alleged failure to establish a Spill-related loss. This argument is tantamount to an alternative causation argument soundly rejected in recent federal court pronouncements interpreting the requirements of the Settlement Agreement. Claimant has satisfied the requirements of Exhibit 4B of the Settlement Agreement and that is all that is required of it.

CONCLUSION

In this baseball appeal process BP has offered zero dollars in its final proposal. None of the arguments advanced by BP is persuasive. Moreover, the panel is satisfied the record is clear and complete and a Summary of Review is not required to resolve the issues presented. Even if one or more of the foregoing assertions of BP were deemed meritorious, their application would not vitiate the substantial monetary award to claimant and support the zero dollar final proposal of BP. For this reason and those stated above, the panel unanimously selects the final proposal of claimant over that of BP. Appeal denied.